Filed 3/29/16 P. v. Hernandez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALBERTO ALAS HERNANDEZ,

Defendant and Appellant.

F069377

(Super. Ct. No. CRM 027008A)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Charles M. Bonneau, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Rachelle Newcomb, Amanda D. Cary and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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Alberto Hernandez appeals from a judgment of conviction entered upon jury verdicts finding him guilty of second degree murder (Pen. Code,[1] §§ 187, subd. (a), 189) and active participation in a criminal street gang (§ 186.22, subd. (a)). Additional gang and firearm-related enhancement allegations were found true in relation to the murder count. The trial court imposed a prison sentence of 40 years to life, with eligibility for parole after 25 years since appellant was only 17 years old when he committed the crimes.

Hernandez challenges the denial of his motion to suppress evidence of an allegedly involuntary confession made during custodial interrogation. He further contends that the trial court erred by excluding proposed expert witness testimony on the subject of false confessions. Lastly, appellant claims that in light of his youth, the imposed sentence is unconstitutionally cruel and unusual. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On March 4, 2013, 18-year-old Shane Moore sustained a fatal gunshot wound while visiting a house on La Mesa Lane in Los Banos. The shooting occurred shortly after he and a group of companions had finished helping the residents of the address move into their new home. Mr. Moore was standing inside of an open garage with six other people when a neighbor, Miguel Sanchez, came over to introduce himself. Mr. Sanchez was accompanied by his friends, Richard Delgado and Tyler Jobe. As the two groups were socializing, an unidentified male snuck up from behind a U-Haul truck that was parked in the driveway and discharged a pistol into the garage. The gunman fired approximately ten shots, causing a bullet to strike Shane Moore in the chest and inflicting non-lethal injuries upon Richard Delgado, Tyler Jobe, and Miguel Sanchez.

Subsequent investigation led authorities to believe the shooting was gang-related, though the decedent had no known gang ties. The shooter's intended target was

[1] Unless otherwise indicated, all further statutory references are to the Penal Code.

apparently Tyler Jobe, a self-admitted "Northerner" who later told investigators that he was shot by some "scraps," which they understood to be slang for members of a rival gang known as the Surenos. Police also learned that a Sureno gang member named Juan Meza lived directly across the street from the crime scene.

There was a break in the case when police reviewed recordings of inmate telephone calls from the Merced County Jail made on the night of the shooting and two days afterward. Conversations between 15-year-old Christopher Aguayo and his older brother, inmate Pablo Aguayo, Jr., appeared to contain coded language referencing details of the crime. Christopher, who is also referred to in the record as "Little One," spoke to his brother about the involvement of someone called "Skeletor." Pablo seemed unfamiliar with that moniker and asked if Skeletor was "Betillo." Christopher responded affirmatively. Investigators knew that Betillo is a Spanish nickname for Alberto, and deduced that the person in question might be Alberto Hernandez. Accordingly, police narrowed their list of suspects to Hernandez, Christopher Aguayo, and Juan Meza. These individuals were known to be "validated" Sureno members and part of a relatively small local subset of the gang called "Territorial Sur Trece" or "TST." Each lived in close geographic proximity to where the shooting occurred.

On the morning of March 22, 2013, police took Christopher Aguayo into custody and interrogated him about the death of Shane Moore. Hernandez was arrested later that afternoon. Aguayo denied responsibility for the murder, but eventually identified Hernandez as the perpetrator. He claimed Hernandez had stopped by his house on the night of the shooting before continuing on to the home of Juan Meza, aka "Tiny." Hernandez had said "there were some people posted by Tiny's house," and wanted Aguayo to come with him. Aguayo argued with Hernandez about going along and ultimately stayed behind, but allowed Hernandez to borrow his bicycle. Aguayo later took his interrogators to a field near the crime scene where Hernandez had allegedly

claimed to have disposed of the murder weapon. The field had since been plowed, and initial attempts to locate the gun were unsuccessful.

The information provided by Aguayo was consistent with evidence developed in earlier stages of the investigation. A witness who lived on a neighboring street reported hearing gunshots and then seeing a person on a mountain bike pedaling down San Simeon Way in the direction of a field. The man remarked that he had "never seen anybody ride a bike that fast." While searching near the field, police found a burgundy-colored "Next" brand mountain bike, the same type of bicycle described by Aguayo in his interview. The alleged shooter, Hernandez, fit the physical profile given to police by victim Tyler Jobe: a teenaged male of Mexican descent and average height, with dark hair and a "skinny" build. Hernandez is a Hispanic male, born September 1995, whose approximate height and weight at the time of the incident was 5'7," 165 pounds. Aguayo told police that he and others called Hernandez "Skeletor" because of his skinny frame.

Custodial interrogation of Hernandez produced a confession that was corroborative of Aguayo's story. The circumstances surrounding the confession are summarized in our Discussion below. Hernandez admitted to being at Juan Meza's house; shooting the victims; fleeing the scene on Aguayo's bicycle; and leaving the bike at the edge of a nearby field. Police returned to the field with metal detectors and discovered a 9mm Ruger P89 semiautomatic pistol buried in the ground. Forensic analysis matched the gun to ten expended shell casings found at the crime scene.

Hernandez was prosecuted as an adult pursuant to Welfare and Institutions Code section 707, subdivision (d)(1). He was charged with one count of murder, three counts of attempted murder, and one count of active participation in a criminal street gang. The murder was alleged to be gang-related within the meaning of section 186.22, subdivision (b), and subject to an enhancement for personal and intentional discharge of a firearm (§ 12022.53, subd. (d).) Christopher Aguayo was originally named as a codefendant on

all counts, but the record indicates that he pled no contest to a charge of accessory after the fact and received a juvenile sentence.

At trial, the prosecution relied heavily on evidence of Hernandez's confession. The substantive gang charge and related enhancement allegations were supported by expert testimony from Detective Eduardo Solis of the Los Banos Police Department, who was also the lead detective in the case. Detective Solis's opinions regarding Hernandez's gang membership were based in part on personal knowledge from prior contacts with him, as well as upon the significance of Hernandez's numerous gang-related tattoos. The defense rested without calling any witnesses.

Hernandez was found guilty of second degree murder and active participation in a criminal street gang, but acquitted on all counts of attempted murder. True findings were made on the enhancement allegations. The trial court imposed a statutorily mandated sentence of 40 years to life in prison (15 years to life for second degree murder, plus a consecutive 25 years to life for the firearm enhancement), with a 25-year minimum period of incarceration prior to parole eligibility. Punishment for the remaining count was stayed pursuant to section 654. This timely appeal followed.

DISCUSSION

Admission of Appellant's Custodial Statements

Hernandez moved to suppress his own incriminating statements to police, as well as evidence pertaining to the interrogation of Christopher Aguayo. Although both motions were denied, the prosecution chose not to introduce any of Aguayo's statements at trial. On appeal, Hernandez claims the trial court erred by finding his confession to be voluntary despite the use of improper interrogation tactics. He also presents a "fruit of the poisonous tree" argument under the theory that his confession was derived from coerced statements by Aguayo. We find no grounds for reversal.

Background

The following summary is based on testimony provided at the hearing on the motion to suppress, and our own review of video recordings of Hernandez's police interview and written transcripts of same.

Hernandez was arrested at his home on March 22, 2013 at approximately 3:30 pm. He was taken to a facility known as the police annex and placed in an interview room that was approximately 8 feet by 8 feet in size and furnished with a desk and three chairs. After being advised of his *Miranda* rights (*Miranda v. Arizona* (1966) 384 U.S. 436), Hernandez submitted to questioning by Detective Solis and his partner, Justin Melden.

Hernandez initially professed ignorance as to why he was being interviewed. Detective Solis advised that they knew of his involvement in an "incident" from three weeks earlier, and asked Hernandez to be forthright in acknowledging the subject of their investigation. When Hernandez continued to act puzzled, the detective asked if he had read the newspaper. He replied, "Oh, yeah, I heard about it," and in response to questions regarding what he had heard, said, "[S]ome people got shot. Some kids. Well, they weren't kids because they were already 18 and up . . . they were saying at La Mesa [Lane], but I don't know about where else … I know one got killed, but I don't know about the other ones. That's what I heard."

The detectives implored Hernandez to be honest and demonstrate remorse for his actions, telling him a showing of honesty and remorse was "the only way out" and "the only way that anybody will ever have any leniency on you." Hernandez was also told that his "boys," i.e. "Tiny" and "Little One," had identified him as the shooter. These tactics had little or no effect during the initial round of questioning, which lasted for approximately 40 minutes until a break was taken. Hernandez repeatedly denied having any involvement in the shooting or being present when it occurred.

Despite his denials, Hernandez acknowledged the nickname "Skeletor," explaining, "I guess they just say 'Skeletor' because I'm skinny." He also confirmed his

association with Juan Meza, spontaneously referencing him by name after pretending not to know anyone named "Tiny" or "Little One" (i.e., Meza and Aguayo). Later, shortly before the first break in questioning, Hernandez began to tell a story about being in Dove Park on the night of the shooting with Juan Meza and "at least 3 or 4 other people" whom he had never met. One of these individuals had been "showing off with a gun." Following the break, Hernandez stuck with this story for another 10 minutes, claiming the sight of the gun had prompted him to leave the park and go home.

Detective Solis accused Hernandez of lying about Dove Park, alleging he had reviewed the "GPS" coordinates from a tracking bracelet that Juan Meza was required to wear as a probationer, which supposedly showed Meza was not in a park on the day of the shooting. When this tactic proved unsuccessful, he urged Hernandez to accept his "help" and warned, "All the evidence is against you. I don't care how you put it. It's all against you. The bike that you used to get there. The gun you used to do it. The bullets. Everything." Hernandez apologized for lying and admitted to being at Meza's house, but did so in the process of transitioning to a new story wherein he had departed from Meza's home after learning that the people there were going to shoot somebody. He explained: "[I had been inside Meza's garage talking on the phone with my mother,] and I was already walking back in and then that's when I heard somebody was gonna be shot. And that's when I looked up and I was, oh, damn, and I was like, oh well, I wanna leave. You know, I didn't have [-] I didn't want nothing to do with that. And so I just got the bike and I just left. And then after that, that's, I just heard gunshots." In this version of events, Hernandez had already reached the nearby field when the shooting took place. Panicked by the sound of gunshots, he decided to abandon the bike and continue home on foot. He reasoned that police were less likely to "pull [him] over and try to do something to [him]" if he was walking as opposed to riding a bicycle.

The detectives continued to accuse Hernandez of lying, and (falsely) informed him that gunshot residue had been found on the bicycle, which must have been transferred

there from the shooter's hands. Hernandez adjusted his account to reconcile it with these purported facts: "Well, I was there . . . This is what happened, alright? When that happened, [the shooter] left, and then he got on the bike, and then I guess some car picked him up, and then I just seen the bike laying there so I picked it up and got [on] it. And that's when I remembered like, wait, he just did this, so the gunpowder must be there, if he touched it, and then that's when I was leaving, then I remembered, and I started hearing the sirens, that's when I just left the bike there. And then I just left."

The second round of questioning lasted approximately 25 minutes. This was followed by a seven-minute break, during which time Hernandez used the bathroom and received a cup of water (water was also provided at the first break). When the interrogation resumed, Hernandez repeated his contentions about a nameless culprit who had fled on a bicycle before entering a getaway vehicle.

After hearing Hernandez's fleeing-shooter explanation for the third time, Detective Melden said, "I'm going to ask you one, one question. Ok, 'cause there's a lot riding on this one question. OK? Did you aim at the guy, or did he walk in front of your gun? That's the question. OK? It's not anything else. Did you mean to kill the guy, the innocent one, not the gangster, or did he walk in front of your gun?" Hernandez replied, "I didn't mean to kill no one …" Detective Melden responded, "Ok, that's huge." This exchange marked something of a turning point in the interrogation. Hernandez began to vacillate between maintaining his innocence and characterizing the homicide as accidental, then admitted to shooting at people whom he perceived to be rival gang members and unintentionally striking the deceased victim.

Following Hernandez's admission of guilt, the detectives focused their efforts on finding the murder weapon. When they asked where the gun was located, he said, "I don't know, somebody picked it up, I don't know who." Further questioning along the same lines produced vague and evasive answers, e.g., "[I] threw it in the bush . . . I don't know [where], it's not there . . . Somebody took it, I don't know . . . It's lost . . . I left it at

the park. And then somebody went to go pick it up." Detective Solis grew frustrated with these responses and took a more aggressive approach, essentially threatening to cause Hernandez's fellow gang members to turn against him if he did not cooperate:

> "What I'm going to do, what we're gonna do right after [this] is we're gonna check your phone records. And the person you called, all those people, every single homey you called, I'm gonna knock their door downs (sic). And I'm gonna tell 'em you sent me there. Because that's all you're gonna get, that's what you're doing. Now you're pissing me off. And you're gonna lead me to all of your homeys' house and that puts you in a very tough spot. Not only, if you want to take the fall for this shit you did, your homeys won't understand that, you weren't mad about it, but when you made the cops go to their house and knock their shit down and find their guns and find their dope, and find all their shit? Now they're gonna be pissed off at you. You see what you're doing here? 'Cause I'm gonna go through all of your records. Through your mom's, through your dad's, through everyone that was involved with you and is connected with you. We're gonna find that gun. . .
>
> . . . [I'm going to] knock every homey's front door down. Everybody already knows who it is. He knows who it is. You know, I'm not gonna be going over there and play with them. I'll just start taking people to jail. And you're gonna be one hated motherfucker, I'll tell you that right now. If you keep fucking playing these games with me. I want that gun and I want it now. Stop feeding me lies. And stop being vague with me. Where's the gun?"

As the detectives pressed him about the gun, Hernandez made requests to see his family. Detective Melden told him, "We talked to our boss. OK? And we, I – we think we can work something out with that, OK? The problem is, is that we have to have, I – we gotta have that gun, man. OK? We gotta have that gun, dude. You know where you put that gun? We need it back, man. There's no reason to keep it. There's no reason to

hide it at this point. OK? We need that gun back, to make sure nobody else gets hurt." Despite the detectives' efforts, Hernandez did not provide further information about the gun. He maintained that it had been discarded in an unspecified park and retrieved by an unknown individual.

The detectives eventually gave up on the gun inquiries and asked Hernandez to provide a complete summary of the crime. The following exchange segued into the final stage of the interrogation:

Melden: I wanna know, from the beginning to the end, the [truth], what happened that day. From the beginning to the end. OK? I'm not opposed to letting you see your family. OK? I don't think that, that's too bad of an issue. You're gonna go to jail tonight. But before we go to jail, I think we could have you down and they could say hi to you, and give you a hug, all that stuff. That being said, I'm not unreasonable. But I need to know the truth from the beginning to the end. OK? Because as I'm treating you with respect, I need respect back. You understand?

Solis: And don't start-, don't come at us with, I was with the homeys, but this other homey walked up, I wanna know whose house you went to, what they told you when, when you wanna do something, how you got there, how you went back –

Hernandez: I never went to no one.

Solis: - all of it.

Melden: Go ahead. Start from the beginning. Go ahead. I'm gonna keep notes so that the shit makes sense. 'Cause this time it's gonna be the truth. It's all out on the table. It's already out there, so don't bullshit, don't hide anything, 'cause -

Solis: For your, for your family.

Melden: Let's go.

Solis: They're the only ones that matter.

Hernandez: When am I going to see them? Actually -

Solis: As soon as we get the damned truth from you!

Hernandez: Yeah, but I should be with them.

Melden: That goes to the, the court. The court and all that shit goes. Tell you what, you being honest with us, will go a long ways for you. It really does. It helps you out, because it makes you look like a human being.

Solis: Because here's the thing –

Melden: These fucking monsters are born every minute, man.

Solis: But you're gonna be charged. Right? You understand that, right? You're gonna be charged. One way or the other. What's up to you is, how long do you want to wait for your family? Murderers and monsters belong in jail. Remorse -, remorseful people, the people that want to be with their family, and show proof that they want to be with their family, go home to their family. Fine -

Melden: You got to pay for what you did, man. You got to. There's no excuse about that. You got to pay for what you did. Right?

Hernandez: Am I gonna get life?

Melden: I don't know what you're gonna get, man. Alright? I don't know.

Solis: We don't -, we don't impose the time.

Melden: I have no idea what you're gonna get. But I do know what, you're a young man –

Hernandez: That's the problem -

Melden: You're a young man. You said what it, it -, you were, you were, it was a mistake. I just want to hear your story of this. OK? Let me hear it.

Hernandez: Well, I just, it just happened. I just gone over there and it happened.

Hernandez went on to make the same admissions as before, this time adding that he had stopped at Aguayo's house to get the bicycle before arriving at the eventual crime scene. Detective Melden thereafter engaged Hernandez in what the trial court characterized as quid pro quo bargaining, more or less offering to allow Hernandez a visit with his family in exchange for an apology letter. Hernandez agreed, and drafted a letter to the decedent's family while sitting alone in the interview room. The letter read as follows:

> "I'm sorry for doing what I did. I didn't mean to do this. It just happened to get in the way. I'm really sorry. If I could take it back, if I could go back in time I would change things. I got a kid on the way. I got my family. I know how you feel. I'm sorry. I hope I'll get to see my family one day, they mean everything to me. I know I fucked up. This is just killing me. I hope you guys forgive me. I was already getting my life together since before it happened. I was going to go to college. My girlfriend is pregnant. I need to be with her. I'm so sorry for this. Damn, I wish this was just a dream. I got a whole life ahead of me. I really hope you guys forgive me. I hope to get out one day to be with my family once again. I regret doing this. I'm really sorry. Sincerely, Alberto Alas Hernandez."

As promised, Hernandez was allowed to visit with his mother and girlfriend inside of the interview room. These events were also captured on video. The footage shows the mother, speaking in Spanish, say, "They are accusing you? Did you do it? Look tell me the truth [. . .] tell me the truth, did you do it?" Hernandez responds with a slight nod, and she reacts by pointing at him and saying, "Yes? Why Beto?" Hernandez shakes his

head, seeming to indicate he has no explanation, and repeats the gesture when she asks why he would hurt people.

The trial court issued an 11-page order denying the motion to suppress Hernandez's custodial statements, including his letter of apology. The order contains a detailed totality-of-the-circumstances analysis regarding the objective circumstances of the interrogation and the various techniques employed by the detectives. The court found, inter alia, that although the interview room was small, it was well lit and provided adequate space between Hernandez and the detectives ("There is nothing about the physical characteristics of the room, its furnishings[,] or the position of the interrogators that was psychologically coercive."). Appellant's juvenile status at the time of questioning was given due consideration, as were the competing factors of his prior experience with the criminal justice system (he was a ward of the court and had previously been interrogated by Detective Solis as a suspect in a gang-related stabbing), his apparent level of intelligence, and his remarkably calm demeanor throughout the interrogation.

The detectives' use of deception and "trickery," i.e., false claims of eyewitness identifications and physical evidence tying Hernandez to the scene, was deemed unlikely to produce a false confession and thus permissible. These techniques were seen as having spawned implausible stories of third party culpability, not admissions of guilt. The trial court faulted the detectives for implying that truthful disclosures would result in some type of leniency for Hernandez, but found "there was no causal connection between the officers making these statements and defendant making an incriminating statement." Several factors were cited in support of this conclusion, including Hernandez's persistent denials and claims of innocence in response to the implied promises. The trial court found the admissions of guilt were motivated by a combination of Hernandez realizing the "illogic and incredulity" of his changing story, and a desire to "minimize his culpability by minimizing the killing." The court further ruled that although the apology

letter "was the result of a quid pro quo proposal," the statements therein were made voluntarily.

Analysis

1. Aguayo's Statements

Hernandez alleges his confession was "coerced by incriminating information induced from Christopher Aguayo in an earlier coercive interrogation." This assertion is made with virtually no supporting analysis. The claim is based on the traditional "fruit of the poisonous tree" doctrine, but Hernandez's only argument is that "detectives used the statement of Christopher Aguayo, extracted earlier the same day, as a means of placing appellant [at] the scene of the shooting." We need not delve further into the circumstances of Aguayo's interrogation to dispose of this issue.

"[W]hen the defendant seeks to exclude a third party's pretrial statement which was obtained through unlawful police coercion the defendant need only prove the unlawful coercion. If he does so, the evidence is deemed 'inherently unreliable.' *But when the defendant seeks to exclude evidence which is at most the fruit of unlawful coercion, e.g., a murder weapon discovered as the result of unlawful coercion of a third party, the defendant must show some connection between the coercion and the evidence to be excluded which makes the evidence unreliable*." (*People v. Lee* (2002) 95 Cal.App.4th 772, 788, italics added, footnotes omitted.) Appellant's argument seems to be that police would never have questioned him about the shooting had Christopher Aguayo not identified him during the course of an allegedly unlawful interrogation. However, as previously explained, the detectives developed Hernandez as a suspect after listening to the jailhouse recordings between Aguayo and his brother, which occurred prior to Aguayo's arrest. In any event, the information Aguayo gave to police was corroborated through independent evidence and Hernandez's own admissions. Hernandez also confirmed that Aguayo was not present at the time of the shooting. Because the element of unreliability has not been shown, the claim fails.

2. Voluntariness

The federal and California state Constitutions require prosecutors to establish, by a preponderance of evidence, that a defendant's confession was voluntarily made. (*People v. Boyette* (2002) 29 Cal.4th 381, 411 (*Boyette*).) "The test for the voluntariness of a custodial statement is whether the statement is ' "the product of an essentially free and unconstrained choice" ' or whether the defendant's ' "will has been overborne and his capacity for self-determination critically impaired" ' by coercion." (*People v. Cunningham* (2015) 61 Cal.4th 609, 642 (*Cunningham*).) In making this assessment, courts must evaluate "the totality of all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226 (*Schneckloth*).) Relevant "characteristics of the accused" include the defendant's age, maturity, education, intelligence, mental health, and physical condition at the time of the interrogation. (*Id*. at p. 226; *Boyette, supra,* 29 Cal.4th at p. 411.) Relevant "details of the interrogation" include the location, length, and continuity of the interrogation, the nature of the questioning (such as aggressive, repeated, or prolonged questioning), the use of physical force or deprivation of food or sleep, and the lack of advice as to the defendant's constitutional rights. (*Schneckloth, supra*, 412 U.S. at p. 226; *People v. Carrington* (2009) 47 Cal.4th 145, 175 (*Carrington*); *Boyette, supra*, 29 Cal.4th at p. 411.)

A ruling on the voluntary or involuntary nature of a confession is largely subject to de novo review on appeal. The trial court's findings as to the characteristics of the accused and the details of the interrogation are generally factual and thus reviewed for substantial evidence. (*People v. Benson* (1990) 52 Cal.3d 754, 779.) The ultimate issue of voluntariness is a question of law. (*Ibid*.) "Where, as was the case here, an interview is recorded, the facts surrounding the admission or confession are undisputed and we may apply independent review." (*People v. Duff* (2014) 58 Cal.4th 527, 551.)

We agree with the trial court's overall assessment of Hernandez and the circumstances under which he was interrogated. His age on the date of questioning was 17 years and six months. He was in his senior year of high school and apparently on pace to graduate, with self-reported plans to attend college. Academic records showed a positive trend from underachievement to above-average grades. We have no doubts as to appellant's intelligence; he displayed cunning and mental agility in parrying the detectives' questions throughout the interrogation.

Hernandez appeared to be in good health and showed no outward signs of distress or disorientation. As noted, he remained calm and confident during the entire process, revealing little emotion until after the interview was over. He was neither gullible nor easily intimidated, as evidenced by his refusal to succumb to Detective Solis's pressure tactics with respect to the murder weapon. Hernandez also expressed distrust and skepticism, even after he had admitted guilt (e.g., "I'm gonna go away anyways"; "I just think you guys are lying"; "I don't think I'm gonna see [my family] again").

The "relevant details of the interrogation" were within acceptable standards. Although the interview room was small, it provided adequate space for the three occupants. The detectives refrained from acts of physical intimidation and mostly spoke in conversational tones. Hernandez had been interrogated by Detective Solis at the same facility on a prior occasion, so the experience was not entirely foreign to him. He was required to keep his hands cuffed in front of him during questioning, but Detective Melden loosened the restraints upon request to ease his discomfort.

The interrogation was not particularly lengthy. The record reflects that the actual question-and-answer session lasted approximately 2 hours and 10 minutes, not including four breaks taken in the interim. Next came preparation of the apology letter, followed by a few intermittent conversations pending the arrival of the mother and girlfriend. Hernandez began to incriminate himself ("I didn't mean to kill no one") after approximately 1 hour and 20 minutes of questioning.

Turning to the challenged interrogation techniques, the issue is whether any material admissions were "extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence." (*People v. Maury* (2003) 30 Cal.4th 342, 404 (*Maury*).) We believe Detective Solis went too far by threatening to kick down the doors of gang members' homes, seize any contraband found inside, make arrests, and blame it all on Hernandez unless he disclosed the location of the gun. The clear implication was that Hernandez would suffer retribution, likely in the form of violence, unless he disclosed certain information. However, "[c]oercive police tactics by themselves do not render a defendant's statements involuntary if the defendant's free will was not in fact overborne by the coercion . . ." (*People v. Rundle* (2008) 43 Cal.4th 76, 114, disapproved on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "A confession is involuntary only if the coercive police conduct at issue and the defendant's statement are causally related." (*Cunningham, supra*, 61 Cal.4th at p. 643.) The causal connection is missing here because (1) Hernandez had already taken responsibility for the shooting before Detective Solis pressed him about the gun, and (2) the coercive tactics did not cause him to change his answers regarding the gun's whereabouts.

Appellant renews his earlier objections to the detectives' use of deception and misinformation. We are not persuaded by those arguments. "Lies told by the police to a suspect under questioning can affect the voluntariness of an ensuing confession, but they are not per se sufficient to make it involuntary." (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1240 (*Musselwhite*).) "The use of deceptive statements during an investigation does not invalidate a confession as involuntary unless the deception is the type likely to procure an untrue statement." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1088.) In other words, "there must be a *proximate* causal connection between the deception or subterfuge and the confession." (*Musselwhite, supra*, 17 Cal.4th at p. 1240.)

At worst, the subterfuge of which Hernandez complains led him to offer dubious tales of innocence rather than admissions of guilt.

The one form of deception that is categorically prohibited is a false promise of leniency. (*People v. Cahill* (1994) 22 Cal.App.4th 296, 315.) "Since threats of harsh penalty often contain an implicit promise of more lenient treatment, they are treated as promises of leniency." (*Id.* at p. 311.) As with other forms of coercion, a promise of leniency does not render a subsequent confession involuntary unless it is the "motivating cause" of the defendant's admissions. (*People v. Linton* (2013) 56 Cal.4th 1146, 1176-1177 (*Linton*); *People v. Williams* (1997) 16 Cal.4th 635, 660-661 [rejecting the view that an offer of leniency necessarily renders a statement involuntary].) " 'This rule raises two separate questions: was a promise of leniency either expressly made or implied, and if so, did that promise motivate the subject to speak?' " (*People v. Tully* (2012) 54 Cal.4th 952, 986.)

Hernandez carries his burden of showing there were express and/or implied promises of lenient treatment in exchange for honesty. Detective Melden explicitly said, "The only way out is the truth. That's the only way that anybody will ever have any leniency on you." On another occasion, Detective Solis told Hernandez, "When we present things to a district attorney, we say, 'Here's what we have. Here's the evidence we have. He didn't want to say anything. He denied it. But we proved he did it.' On the other hand [indicating with right hand], here's what we have: 'He worked with us. He was apologetic. He regretted it. He understands he fucked up in life.' On this one [indicating first scenario], they're just gonna throw the book at you. Over here [indicating with right hand], they're going to be like[,] 'Mm, well, he fucked up. Let's go see what we can do with the guy. What does he want to do to help himself? And they consider all that."

The two examples we have cited occurred during the initial round of questioning. Later, Detective Melden made a reference to Hernandez's unborn child (his girlfriend was

pregnant), saying, "That kid will never see you, you keep lying. That kid will never see you." Hernandez nevertheless maintained his innocence and told three different versions of events before finally admitting guilt. Continuing to deny responsibility in the face of the detectives' express and implied promises shows an absence of the required causal effect. (*People v. Williams* (2010) 49 Cal.4th 405, 444; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 58 ["His resistance, far from reflecting a will overborne by official coercion, suggests instead a still operative ability to calculate his self-interest in choosing whether to disclose or withhold information."]; cf. *People v. Perez* (2016) 243 Cal.App.4th 863, 876-877 [causation found where defendant incriminated himself "immediately after" police promised that if he cooperated and told the truth, he would not be charged].) Appellant's evasive responses to the gun questions after conceding his role in the crime bolsters the conclusion that his capacity to make self-interested decisions remained intact despite the detectives' improper behavior.

The trial court was correct in determining that the motivating cause of Hernandez's admissions was a combination of him realizing that his story had become unbelievable, and concluding the "accident" narrative made him appear less culpable. Detective Melden had repeatedly expressed a willingness to believe the victim's death was unintentional, but such assurances were not illegal. A detective's "suggestions that the killing[] might have been accidental . . . and that such circumstances could 'make[] a lot of difference,' fall far short of being promises of lenient treatment in exchange for cooperation." (*People v. Holloway* (2004) 33 Cal.4th 96, 116; accord, *Carrington*, *supra*, 47 Cal.4th at p. 171 [detective's suggestions that homicide was accidental "merely suggested possible explanations of the events and offered defendant an opportunity to provide the details of the crime. This tactic is permissible."].)

Appellant also complains of the detectives' failure to advise him of the right to make phone calls while in custody. The law requires that when an officer takes a juvenile to a place of confinement, "[i]mmediately . . . except where physically

impossible, [and] no later than one hour after he has been taken into custody, the minor shall be advised and has the right to make at least two telephone calls from the place where he is being held, one call completed to his parent or guardian, a responsible relative, or his employer, and another call completed to an attorney." (Welf. & Inst. Code, § 627, subd. (b).) There is no indication that the detectives in this case complied with these requirements. However, the exclusion of evidence is *not* an available remedy for a violation of Welfare and Institutions Code section 627. (*People v. Nelson* (2012) 53 Cal.4th 367, 379, fn. 4; *People v. Lessie* (2010) 47 Cal.4th 1152, 1161 & fn. 2.)

Hernandez first spoke of wanting to see his family after expressing that he never intended to kill anybody. Detective Melden asked if he wished to apologize to the family of the deceased victim, and Hernandez replied, "I just want to see my family, you know." Hernandez made additional incriminating statements before inquiring, "Well my question is, will I see my family?" Detective Melden responded, "Oh yeah, I'm sure you'll see them again. I'm sure you will." Hernandez then asked "why?" and Detective Melden replied, "Here's the question: I can't tell you what kind of jail [time] you're looking at, but that's why I'm trying to determine, did you mean to point the gun at him and kill him, or not?" Hernandez said "no" and continued to implicate himself in the shooting. His insistence upon seeing his family did not occur until towards the end of the interview, during and after questioning about the gun.

The detectives' quid pro quo overtures in the final stage of the interrogation were improper and tainted the admissibility of the apology letter. The trial court recognized the letter "was the result of a quid pro quo proposal," but focused on the lack of external input as to the actual contents of the writing ("There was nothing on the [video] to indicate that any officer was present to suggest what the content, length or style of the letter should be."). The dispositive inquiry is whether an improper promise or exertion of influence was the motivating cause for the statement at issue. That being said, the erroneous admission of the apology letter was clearly harmless. (*People v. Cahill* (1993)

5 Cal.4th 478, 509-510 [admission of involuntary confession subject to harmless error analysis under the standard enunciated in *Chapman v. California* (1967) 386 U.S. 18].) The letter contained only a generalized concession of wrongdoing and focused on Hernandez's concern for his own future. This evidence was superfluous to the admissions made during the interrogation and less probative of his guilt. The footage of him acknowledging responsibility for the crime to his mother, which was shown to the jury, was arguably more compelling than the letter.

The record demonstrates, by a preponderance of evidence and under the totality of the circumstances, that Hernandez's incriminating statements during custodial interrogation were voluntary. Any error in the admission of evidence concerning the letter of apology was harmless, i.e., it is evident beyond a reasonable doubt that the jury's verdict would have been the same had proof of the letter and its contents been excluded. We find no cause for reversal based on the use of Hernandez's custodial statements at trial.

Exclusion of Proposed Expert Witness Testimony

Appellant challenges the exclusion of proposed testimony by psychologist Phillip Hamm, Ph.D. The defense was prepared to have Dr. Hamm testify on the topic of false confessions, subject to the outcome of an Evidence Code section 402 hearing on the witness's qualifications and the admissibility of his opinions. The trial court found Dr. Hamm unqualified to render expert opinions on the subject of false confessions, and further ruled to exclude the proposed testimony pursuant to Evidence Code section 352.

Background

Dr. Hamm is a licensed clinical and forensic psychologist with approximately 40 years of professional experience. The clinical aspect of his practice involves diagnosis and treatment of mental disorders. As a forensic psychologist, he "applies psychological knowledge, principles, and practices to legal problems," primarily in the areas of criminal law, personal injury cases, and child custody work. He has provided expert testimony in

court over 200 times, but never on the subject of false confessions (at least not as of February 2014).

Dr. Hamm's direct research into the subject of false confessions consisted of reading four articles by Saul Kassin, whom he considered to be "the foremost authority in the field," and a review of approximately ten scholarly articles concerning "cases where a confession resulted from coercive techniques." Had he been allowed to testify, the witness would have also relied on his own studies in the field of behavioral psychology. His relevant experience as an expert witness was limited to pre-trial work on a murder case involving a woman who, with her boyfriend, was accused of killing a man. He prepared a report based on his psychological evaluation of the defendant and a review of materials pertaining to her 13-hour interrogation by police. The woman had been "coming down off methamphetamine" during the interview and became so fatigued that she actually fell asleep while being questioned. The case never went to trial.

Dr. Hamm was also involved in approximately 24-36 cases wherein he reviewed "transcripts and video recordings of police interrogations that were clearly coercive." He was of the opinion that in each instance the evidence "raised a question of false confession," but "none of those cases ever proceeded in that direction." After reviewing the evidence of Hernandez's confession, Dr. Hamm formed the opinion that he too had been subjected to a number of coercive interrogation techniques which tended to increase the likelihood of a false confession.

The trial court made a detailed record of its decision to preclude Dr. Hamm from testifying before the jury. The most salient aspects of its ruling with respect to the witness's qualifications are as follows:

> "There [are] a number of issues to deal with, and I'm going to take them in the following order: First of all, whether Dr. Hamm is qualified to testify as an expert on false confessions. I find that he is not. After looking at his background in this particular field, essentially his expertise is limited to reading about nine or ten

articles, four of which were written by Mr. Kassin or Dr. Kassin, and the rest were essentially summaries of the actual studies. I don't think this qualifies as sufficient training and expertise on the issue of false confessions.

I would also note that Dr. Hamm's formal education was in counseling psychology, not in any particular subspecialty, but counseling. Which would have nothing to do with the legal issues that he normally is asked to deal with . . . [¶] He does have expertise in forensic psychology. And forensic psychology, the areas where he was primarily involved in, were on court-appointed cases. It's limited to competency and insanity issues. He's never been appointed on any issue related to false confession testimony."

In the court's view, the crux of Dr. Hamm's proposed testimony was his belief "that some coercive interview techniques have the potential to produce a false confession." Such opinions would not aid the trier of fact on matters beyond common experience, even if the witness was qualified to render such opinions based on general principles of psychology. The court also believed the proposed testimony threatened to confuse the issues and/or mislead the jury. In the same vein, Dr. Hamm's proposed testimony implicated the question of voluntariness, which had already been decided by the court, and would also invade the jury's province to determine whether Hernandez's incriminating statements were actually true.

Analysis

The trial court's determination that a witness does or does not qualify as an expert is a matter of discretion that will not be disturbed absent a showing of manifest abuse. (*People v. Jones* (2012) 54 Cal.4th 1, 57.) If the witness qualifies as an expert, the trial court retains broad discretion in determining whether to admit or exclude the expert's proposed testimony. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299.) We find no abuse of discretion in this case.

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code § 720, subd. (a).) Hernandez's arguments are focused on refuting the trial court's finding that Dr. Hamm was not qualified to testify as an expert in the area of false confessions. Even if we were to accept his position on this point, we would uphold the trial court's ruling under Evidence Code section 352. Hernandez asserts in his reply that the court never engaged in a "section 352 analysis," but the record belies his contention.

"A trial court has broad discretion to exclude relevant evidence under Evidence Code section 352 'if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' [Citations.] Such 'discretion extends to the admission or exclusion of expert testimony.' " (*Linton, supra*, 56 Cal.4th at p. 1181.) Most of Dr. Hamm's opinions, and the basis for those opinions, involved correlations between false confessions and coercive police activity, including how people respond to express and implied promises of leniency. The trial court was within its authority to conclude the proposed testimony presented a significant danger of confusing and/or misleading the jury as to the issues of truthfulness and voluntariness. The court made clear its belief that the probative value of Dr. Hamm's opinions was quite low, and we will not disturb its implied finding that such value was substantially outweighed by the likelihood of the jury being confused or misled by his testimony.

Appellant's claim is similar to the one raised in *People v. Ramos* (2004) 121 Cal.App.4th 1194 (*Ramos*), where a defendant sought to introduce expert testimony on the subject of "police interrogation techniques and false confessions." (*Id*. at p. 1204.) The trial court refused to allow the purported expert to testify. On appeal, the defendant argued his expert's proposed testimony "that certain police interrogation techniques have

a tendency to produce unreliable acknowledgments of guilt would have served to refute the commonly held notion that people do not confess to crimes they did not commit." (*Id*. at p. 1205.)

Hernandez, like the defendant in *Ramos*, relies on *Crane v. Kentucky* (1986) 476 U.S. 683 (*Crane*) to support the argument that exclusion of Dr. Hamm's testimony deprived him of the constitutional right to present a defense. The *Ramos* opinion summarizes the distinguishable facts of *Crane*:

> "In *Crane*, a 16-year-old defendant testified at a pretrial motion to suppress that he had been detained in a windowless room for a protracted period of time, that he had been surrounded by as many as six police officers during the interrogation, that he had repeatedly requested and been denied permission to telephone his mother, and that he had been badgered into making a false confession. In opening statement, defense counsel told the jury the defense would present evidence regarding the length of the interrogation and the manner in which it had been conducted to demonstrate the statement was unworthy of belief. Prior to the presentation of any evidence, the trial court sustained the prosecutor's objection to the admission of evidence related to the circumstances of the confession. The trial court ruled the defense could inquire into inconsistencies in the confession but could not present any evidence about the duration of the interrogation or the individuals in attendance on the ground such evidence was relevant only to the issue of voluntariness, which was not before the jury." (*Ramos, supra*, 121 Cal.App.4th at pp. 1205-1206.)

"*Crane* held the reliability of a confession and its voluntariness are two separate questions, reliability being a factual issue for the jury and voluntariness being a legal issue for the court. *Crane* concluded the 'blanket exclusion' of evidence related to the circumstances of the confession deprived the accused of a fair opportunity to present a defense." (*Ramos, supra*, 121 Cal.App.4th at p. 1206, citing *Crane, supra*, 476 U.S. at

p. 690.) Here, the trial court's exclusion of Dr. Hamm's testimony in no way amounted to a blanket exclusion of evidence related to the circumstances of Hernandez's confession. The jury viewed the same footage of the questions and answers as had been presented to the trial court on the motion to suppress, and saw Detective Solis questioned on the witness stand about his interrogation techniques.

"Although a defendant has the general right to offer a defense through the testimony of his or her witnesses, 'a state court's application of ordinary rules of evidence – including the rule stated in Evidence Code section 352 – generally does not infringe upon this right … .' " (*Linton*, *supra*, *supra*, 56 Cal.4th at p. 1183.) Hernandez has shown neither an abuse of the trial court's discretion nor a violation of his constitutional due process rights. We therefore reject his claim regarding the exclusion of Dr. Hamm's proposed testimony.

Sentencing

Hernandez alleges his indeterminate sentence of 40 years to life in prison is the "functional equivalent" of life without the possibility of parole, which, given that he was a 17-year-old juvenile at the time of the offense, violates the constitutional guarantee against cruel and unusual punishment. He maintains this position even while acknowledging that the trial court found him eligible for parole after serving 25 years of his sentence, as required by the provisions of section 3051. We find the claim to be meritless.

As used in the Eighth Amendment to the federal Constitution, the phrase "cruel and unusual punishments" refers to "extreme sentences that are 'grossly disproportionate' to the crime." (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001.) The California Constitution forbids cruel *or* unusual punishment (Cal. Const., art. I, § 17), which precludes a sentence that is " 'so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' " (*People v. Carmony* (2005) 127 Cal.App.4th 1066, 1085, quoting *In re Lynch* (1972)

8 Cal.3d 410, 424.) Appellant's claim is based on a line of cases dealing with the constitutional limits of punishment for juvenile offenders, particularly *Miller v. Alabama* (2012) 567 U.S. ___ [132 S.Ct. 2455] (*Miller*). The *Miller* case holds it is cruel and unusual to impose a mandatory sentence of life without parole for a homicide committed prior to the defendant's 18th birthday, and requires that sentencing courts be given discretion to consider the juvenile offender's age and youthful characteristics before ordering such punishment. (*Miller, supra,* 567 U.S. at p. _ [132 S.Ct. at p. 2475].) Hernandez also tries to borrow a concept from *People v. Caballero* (2012) 55 Cal.4th 262, which holds that sentencing a juvenile offender for a *nonhomicide* offense to a term of years with a parole eligibility date that falls outside of his or her natural life expectancy is the "functional equivalent" of life without the possibility of parole and therefore unconstitutional. (*Id*. at pp. 267-268.)

Hernandez's argument is flawed at the outset by the notion that a sentence of 40 years to life imposed against a 17-year-old defendant constitutes a de facto sentence of life without the possibility of parole.[2] He cites no evidence or authority for the implied contention that his life expectancy is less than or equal to 57 years, and has no other basis for challenging the constitutionality of his sentence. (See *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1230-1231 [upholding sentence of 40 years to life for 17-year-old gang member convicted of premeditated attempted murder with a firearm enhancement]; see also, *People v. Martinez* (1999) 76 Cal.App.4th 489, 494 ["Only in the rarest of cases could a court declare that the length of a sentence mandated by the Legislature is unconstitutionally excessive."].) Moreover, under section 3051, subdivision (b)(3), "[a] person who was convicted of a controlling offense that was committed before the person

[2] Hernandez was sentenced on April 4, 2014. Although 18 years old on the date of sentencing, he received 378 days of pre-sentence custody credit. Therefore, not accounting for the provisions of section 3051, the sentence of 40 years to life makes him eligible for parole at age 57.

had attained 23 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the [Board of Parole Hearings] during his or her 25th year of incarceration at a youth offender parole hearing . . . ." Accordingly, Hernandez will be eligible for release at the age of 42. We perceive no constitutional barriers to the sentence imposed by the trial court.

Miscellaneous Issues

Hernandez requests that we amend the abstract of judgment to reflect his eligibility for parole after 25 years of incarceration as provided by section 3051, subdivision (b)(3) and recognized by the trial court during its oral pronouncement of sentence. The general authorities cited in appellant's briefs do not compel such modification. Parole eligibility is determined by the Legislature and governed by the general parole eligibility statute, section 3046. That statute provides:

> "(a) An inmate imprisoned under a life sentence shall not be paroled until he or she has served the greater of the following:
>
> (1) A term of at least seven calendar years.
>
> (2) A term as established pursuant to any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole." (§ 3046, subd. (a)(1), (2).)

Section 3051 logically falls under the umbrella of "any other law that establishes a minimum term or minimum period of confinement under a life sentence before eligibility for parole." In addition, Section 3046, subdivision (c) provides: "Notwithstanding subdivisions (a) and (b), an inmate found suitable for parole pursuant to a youth offender parole hearing as described in Section 3051 shall be paroled regardless of the manner in which the board set release dates pursuant to subdivision (a) of Section 3041, subject to subdivision (b) of Section 3041 and Sections 3041.1 and 3041.2, as applicable." Hernandez's abstract of judgment reflects his date of birth, the year in which the offenses

were committed, and his date of conviction and sentencing, thus establishing the applicability of section 3051.

The imposition of an indeterminate life sentence technically translates to a term of life with the possibility of parole after seven years (§ 3046, subd. (a)(1)), but the seven-year eligibility period is not ordinarily reflected in the abstract of judgment. Hernandez fails to show why a different approach should be used in cases where the defendant's age implicates the provisions of section 3051. We find no error in the abstract of judgment.

Finally, we address Hernandez's motion to strike a supplemental authorities letter filed by the Attorney General on March 2, 2016, prior to oral argument. The letter identifies five cases decided subsequent to the filing of the parties' briefs in this matter, and provides a brief synopsis of each case. Hernandez complains these summaries violate Rule 8.254(b) of the California Rules of Court (Rule 8.254(b)), which specifies that "[n]o argument or other discussion of the [cited] authority is permitted in the letter." We have disregarded all verbiage in the letter that does not comply with Rule 8.254(b), and therefore decline to strike the letter itself. Appellant's motion is denied.

DISPOSITION

The judgment is affirmed.

_____
GOMES, Acting P.J.

WE CONCUR:

_____
POOCHIGIAN, J.

_____
DETJEN, J.